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IN THE

Supreme Court of the United States

..... Term, 1965

No. 278 1

UNITED STATES OF AMERICA,

vs.

CHESTER WILLIAM STUPAK.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDIX

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IN THE

Supreme Court of the United States

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CHESTER WILLIAM STUPAK.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Chester William Stupak, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Third Circuit entered in the above cause on May 25, 1965, affirming the judgment of conviction and sentence of the United States District Court for the Western District of Pennsylvania following trial of petitioner for wilful failure to pay the special tax imposed upon persons engaged in the business of accepting wagers.

Opinions in the Courts Below

The Opinion, *per curiam*, of the Court of Appeals is reported at ____ F. 2d ____ and is reproduced in the Appendix at page 12.

The Opinion of the District Court was not published and is reproduced in the Appendix of appellant filed in the court below at page 178a.

Jurisdiction

The judgment of the Court of Appeals sought to be reviewed is dated May 25, 1965. This court has jurisdiction to review the judgment under 28 U. S. C. § 1254(1).

Questions Presented

1. In a prosecution for wilful failure to pay the special tax imposed upon persons engaged in the business of accepting wagers, where the government charged and offered proof that petitioner was the partner of another in the operation of a numbers lottery and under such circumstances payment of only one special tax was required, did not the government's burden of proof that the tax was due include the duty to prove that the tax had not been paid by the partner it claimed petitioner had, and if such was the government's burden was the petitioner denied due process of law and a fair trial by the holding of the District Court, affirmed in the Court of Appeals, to the effect that the matter was one of defense and which in effect required petitioner to prove his innocence?

2. Where the principal evidence of guilt consisted of admissions allegedly made by petitioner and his partner as testified to by the chief government witness, a local police detective, who claimed petitioner and the alleged partner paid him bribes, which he had not kept, to protect their numbers business and petitioner claimed that the witness has testified falsely to conceal the fact that he had failed to disclose to his superiors the true reason petitioner

had paid him money or the correct amount he received, was it not error to refuse petitioner the right to develop on cross examination and by direct testimony that the witness had made large and lavish personal expenditures which his apparent financial condition would not have enabled him to make?

3. Where two of the jurors admitted having read during the trial newspaper articles in which it was stated, among other things, that petitioner's alleged partner had earlier been convicted on gambling charges, and in which petitioner was described as a numbers "baron" and "writer", and the court refused to interrogate the jurors separately concerning the influence on them of the prejudicial article in question, was not the refusal of the courts below to order a new trial erroneous and contrary to fairness and to decisions of this court?

Constitutional and Statutory Provisions Involved

Amendment V to the Constitution of the United States of America provides:

> "No person shall be * * * deprived of life, liberty, or property, without due process of law * * *"

26 U. S. C. § 4411 provides:

> "There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable."

26 U. S. C. § 4401(c) provides:

> "(c) Persons liable for tax.—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. * * *"

26 U. S. C. § 4413 provides:

> "Sections 4901, 4902, 4904, 4905 and 4906 shall extend to and apply to the special tax imposed by this subchapter and to the persons upon whom it is imposed, and for that purpose any activity which makes a person liable for special tax under this subchapter shall be considered to be a business or occupation referred to in such sections. No other provisions of sections 4901 to 4907, inclusive, shall so extend or apply."

26 U. S. C. § 4902 provides:

> "Any number of persons doing business in copartnership at any one place shall be required to pay but one special tax."

26 U. S. C. § 4903 provides:

> "The payment of the special tax imposed, other than the tax imposed by section 4411, shall not exempt from an additional special tax the person carrying on a trade or business in any other place than that stated in the register kept in the office of the official in charge of the internal revenue district. * * *"

Statement

Jurisdiction arose in the District Court as a result of the filing against petitioner of a federal information alleging his wilful failure to pay the special tax imposed by 26 U. S. C. § 4411 on persons engaged in the business of accepting wagers.

1.

The information charged that petitioner and one Henry Katz, an "associate" but not a defendant, were engaged, between September 1, 1957 and March 1, 1958, in the operation of a numbers lottery in Pittsburgh, Pennsylvania, having a proprietary interest therein, and that petitioner was engaged in the business of accepting wagers and was

required, but wilfully failed, to pay the special tax (5a).* To prove the charge, the government relied principally upon the testimony of a single witness, John James. James was a police detective employed by the City of Pittsburgh. His testimony was to the effect that in August or September, 1956, he had been placed on a special assignment which enabled him over the next eighteen months to accept a series of bribe payments from each of numerous persons engaged in illegal activities, who were under the impression that such payments would guarantee them against police interference (48a, 109a, 127a, 152a). James claimed that, while acting pursuant to his special instructions, he met the petitioner and Katz in a Pittsburgh nightclub on February 6, 1957, at which time petitioner and Katz disclosed to him their joint interest as equal partners in a numbers business (40a, 95a, 119a, 161a), identified certain writers and locations as being theirs (47a) and proposed to pay James $300 a month for protection. The admissions of both Katz and petitioner, as reported by James, were employed against petitioner. James further testified that he had on that occasion and subsequently received from petitioner payments amounting to $1,350.00 (51a-58a), all of which he claimed he turned in to his superiors with a full and truthful report on his activities. The foregoing was bolstered by government evidence that certain of the persons allegedly named by Stupak and Katz to James as being their writers had been arrested in numbers raids during the information period. The government further introduced testimony that Stupak knew the tax requirement (14a) and also called a witness from the Internal Revenue Service to prove that Stubak had not paid the tax (10a). While the government had proved in its own

* References are to the appendix for appellant filed in the court below.

case that Katz and Stupak were partners, a contention that Stupak disputed, there was no evidence introduced by the government to show whether or not the tax had been paid by Katz.

After the government rested, the provisions of section 4902 were called to the attention of the court. The government then requested, but was refused permission to reopen to prove whether the tax had been paid by Katz or not. Subsequently, following conviction, petitioner's motion for judgment of acquittal or for a new trial on the basis of the failure of the government to prove that a tax was due was denied. In its opinion (at 180a), the District Court rejected petitioner's contention that the government was required but had failed to prove that the single tax owed by the partnership had not been paid by Katz. The Circuit Court, without discussing the matter, affirmed.

2.

Petitioner did not himself testify. The defendant introduced evidence in line with its theory that petitioner had been engaged in playing dice but was not in the numbers business. From some time around February, 1957 (Transcript 415), the date of James' first contact with petitioner, it was shown that he had commenced to operate a dice game on the South Side of the City and did so without police interference throughout the year (Transcript 416). It was the petitioner's position, as indicated by the cross examination of James (157a-158a), that the latter had been paid by him for permitting or protecting the dice game and that James had kept these sums but reported to his superiors that the money actually paid by Katz for the protection of Katz's numbers business was paid by both Katz and petitioner.

Petitioner attempted to show by cross examination of James and also through offers to produce evidence that during the period involved James had spent large sums in cash for such things as furniture, a trip to Florida, education expenses for his daughter, a Cadillac ($2762), a station wagon ($2300), down payment on a home ($5000) and a piece of machinery ($2500). Petitioner offered to show, also, that James' salary as a police officer was $5,000 per year and that he had had no profits or had a loss in a florist business in which he had an interest. The offers are at 101a-106a, 107a, 145a, 164a-169a. The rulings sustaining the government's objections are at 108a, 148a, 151a, 165a, 168a. Petitioner was prevented from asking even what the witness' salary was (151a).

The purpose of the cross examination and offers was to show that James had testified untruthfully against petitioner and had a reason and bias causing him to do so. Had reasonable latitude been allowed in the cross examination of James as to his expenditures and the source of the moneys he spent, petitioner might well have proved the sums he spent for personal acquisitions had come from those who were accustomed to pay him bribes. The government had no obligation of protect the witness against a full inquiry into his finances.

If as the defense contended, James had received money from Stupak for protection of a dice game which James had pocketed, additional money for the protection of Katz, but none at all from the petitioner for protection of a numbers business, a sufficient motive for his false testimony and bias against Stupak existed. His job, and perhaps his liberty, depended on the effectiveness with which he lied. To show he spent money he received in bribes (*i.e.*, more than he legitimately had) would obviously have

proved he received more than he said and, inferentially, for other purposes than he declared.

3.

On the second day of trial, two of the jurors admitted that they had read articles appearing in the newspapers for the evening and morning before in which lengthy reports of the trial were given and in which petitioner was characterized as a "former South Side numbers baron" and numbers writer". It had not been contended by the government that petitioner was either a numbers baron or writer, only that he had a proprietary interest in a numbers business. In one of the articles, a special section was devoted to the prior conviction of Katz under separate heading entitled "Katz Convicted, Appealing". It was revealed that "Katz was convicted last June on gambling charges" and had appealed for a new trial (172a-174a). Evidence as to the previous conviction of Henry Katz, petitioner's alleged partner, could not properly have been admitted at the trial because of its highly prejudicial and inflammatory effect.

Prior to the time counsel for petitioner requested that the jurors be interrogated concerning their reading of the newspaper articles, the jurors had not been instructed against exposure to radio, television or newspaper publicity concerning the trial. Nor was there afterwards any proper interrogation of the jurors to determine the extent of the influence on their minds the newspaper articles had, although this had been requested (64a-65a). The court merely asked the two jurors who admitted reading the articles whether they could still bring in a fair verdict and, of course, they claimed they would remain uninfluenced (67a). Petitioner's motion for a mistrial was

denied and subsequently the court denied a motion for a new trial based upon this ground. The opinion of the Court of Appeals did not specifically discuss petitioner's contention that he had been deprived of a fair trial by reason of the exposure of the jurors to the prejudicial newspaper articles.

Reasons for Granting the Writ

1. First Question Presented: Even though the government's case was replete with evidence which brought 26 U. S. C. § 4902 into play, the Circuit Court affirmed the District Court's holding that petitioner had the burden, by way of defense, to show payment of the tax by a partner whom the government claimed but petitioner denied he had. This ruling, as affirmed, appears to result in a violation of the principle that the burden of proving petitioner's guilt, *i.e.*, that the tax was due in this instance, rested on the government.

The decision of the court below involves a federal question of substance concerning not only the proper interpretation and application of 26 U. S. C. § 4902 in the enforcement of the wagering tax laws, but also the incidence of the burden of proof generally in criminal cases where a defense arises from the government proof.

The decision of the Court of Appeals in this instance also appears to be contrary to decisions of other courts of appeal and other federal courts on similar, although not identical, questions. See *Johnson v. United States,* U. S. App. D. C., 317 F. 2d, 127, 129, note 2; *Cf. United States v. Fabrizio,* D. Del., 193 F. Supp. 446, 450. So far as petitioner has been able to discover, this court has not heretofore passed upon the questions presented by the foregoing.

2. Second Question Presented: In foreclosing the right of the petitioner to develop by way of cross examination and by affirmative proof matters bearing on the financial involvement of the witness James which would have affected his credibility and tended to show his bias and motive to testify falsely, the District Court departed from, and the Court of Appeals sanctioned a departure from, the accepted and usual course of judicial procedures. In this case, the finding of guilt depended upon acceptance of the testimony of a single witness, whose opportunities to enrich himself by reason of his position were obvious. The accepted and usual course would have been to permit a wide range of cross examination to show the bias, motive or animus of this witness. *Alford v. United States,* 282 U. S. 687, 51 S. Ct. 218; *Jones v. Schanck,* U. S. App. D. C., 248 F. 2d 658, 659; *United States v. Lester,* 2 Cir., 248 F. 2d 329, 334; *United States v. Augustine,* 3 Cir., 189 F. 2d 587, at pages 590-591.

3. Third Question Presented: This court held in *Marshall v. United States,* 360 U. S. 310, 79 S. Ct. 1171, that the exposure of some of the jurors to newspaper articles containing matters highly prejudicial to the defendant required the granting of a new trial, not merely the giving of cautionary instructions. In this case, highly detrimental and inadmissible information came to the attention of at least two members of the jury and could not have but prejudiced their minds against the petitioner. No proper investigation was made to determine the effect of the articles on their minds. Under these circumstances, exercise of this court's power of supervision to review on writ of certiorari is indicated because of the failure of the court below to require observance of the procedure required by the *Marshall* case.

Conclusion

On the basis of the following, your petitioner respectfully prays that this court grant his petition for writ of certiorari.

Respectfully submitted,

JOHN E. EVANS, SR.,
PAUL E. MOSES,
Attorneys for Petitioner.

APPENDIX

Opinion of the Court

(Filed May 25, 1965)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 15123

UNITED STATES OF AMERICA,

v.

CHESTER WILLIAM STUPAK,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued May 18, 1965

Before: STALLEY, HASTIE and GANEY, *Circuit Judges.*

PER CURIAM:

On the entire record the court finds no reversible error in this conviction for willful failure to pay the special tax imposed upon persons engaged in the business of accepting wagers. 26 U. S. C. § 4411.

The judgment will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 278

CHESTER WILLIAM STUPAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. 12) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1965. The petition for a writ of certiorari was filed on June 21, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in precluding a collateral inquiry designed to impeach the credibility of a government witness by demon-

781-615—65

strating that his personal expenditures exceeded his legitimate personal income.

2. Whether, in a prosecution for willful failure to pay the special wagering tax, where the government established that no wagering tax return had been filed for petitioner, the government was also required to show as part of its case in chief that no return had been individually filed by petitioner's partner.

3. Whether the trial court abused its discretion in determining that a mistrial was not necessitated by the exposure of two jurors to newspaper accounts of the trial.

STATEMENT

Petitioner was convicted after a jury trial of willful failure to pay the wagering tax imposed by 26 U.S.C. 4411, in violation of 26 U.S.C. 7203. He was sentenced to imprisonment for four months, was fined $2,500 and costs, and was placed on probation for two years (R. 4a).[1] The court of appeals affirmed per curiam.

The evidence showed that in 1951 petitioner was informed by an Internal Revenue Officer that if he was engaged in the numbers business he was required to pay the special wagering tax (R. 13a–14a). In February, 1957, John James, a Pittsburgh police officer assigned to investigate violations of the Pennsylvania lottery laws (R. 47a–48a), met petitioner and Henry Katz at the latter's request (R. 42a–43a,

[1] "R. —" references are to petitioner's Appendix in the Court of Appeals.

157a), after securing approval and instructions from the Superintendent of Police (R. 48a). During the meeting, petitioner and Katz disclosed that they were engaged in the operation of a numbers business (R. 45a–46a), the profits from which were divided between them (R. 95a, 119a, 161a) and told James the names and locations of some of their employees (R. 45a–47a). They offered James $300 a month to refrain from raiding the locations in which they were interested (R. 49a). Petitioner paid James $300 that evening (R. 50a) and a total of $1,350 thereafter (R. 51a–53a, 56a–58a, 122a). All of the payments were turned over by James to a superior (R. 51a–53a, 120a, 123a). Some of the specified locations were raided by the police and current dated numbers slips were found (R. 25a–27a, 29a–30a, 35a–37a, 40a–42a, 54a, 162a). Internal Revenue Service records indicated that for the period in question no special wagering tax return had been filed for petitioner (R. 9a–11a).

During the cross-examination of James, petitioner's counsel sought to question him concerning his income (R. 144a–145a) and cash purchases he had made (R. 99a–100a). Out of the hearing of the jury, counsel explained he intended to show that James had made large personal expenditures in excess of an amount which might be expected from his income (R. 101a–102a, 105a–107a, 149a), that the expenditures indicated James had received more bribe payments from petitioner and others than he had reported and delivered to his superiors (R. 101a, 104a, 148a), and that this impugned James' credibility (R. 102a,

146a, 148a) and demonstrated a motive to testify falsely (R. 102a). The government stated that it would have no objection to questions concerning whether James had accepted bribes (R. 104a, 149a) but objected to any collateral attempt to prove misconduct by a comparison of income and expenditures (R. 102a, 104a, 107a, 149a). The objections were sustained (R. 108a, 147a–148a). The court held that petitioner would not be permitted to attack the credibility of the witness by scrutinization of all of his financial transactions and by attempts collaterally to show specific matters for which he had not been convicted (R. 147a). Subsequently, petitioner's counsel made offers of proof concerning certain of James' expenditures to which his proposed witnesses could testify (R. 163a–164a, 166a–167a).

After the government rested its case, petitioner's counsel argued that co-partners are liable for only one special tax between them under 26 U.S.C. 4902, and that the government had failed to establish that petitioner's partner, Katz, had not paid the tax on behalf of the enterprise.[2] The government moved to reopen its case to resolve any question on the matter but the court denied the motion (See Pet. 6). In its opinion denying petitioner's later motion for a judgment of acquittal, the court held that the government did not have the burden of establishing in its case in chief

[2] Katz had, in fact, been convicted for willful failure to pay the special tax for the same period. *United States* v. *Katz*, 332 F. 2d 422 (C.A. 3). Petitioner and his attorney were aware of this ~~conviction~~ CONVICTION (*e.g.*, R. 70a, 72a, 74a).

that the tax owed by petitioner had not been paid by someone else, but that this "was a matter of defense and the government's evidence in this respect was sufficient" (R. 180a).

On the morning of the second day of trial petitioner's counsel disclosed to the court that a short article concerning the trial had appeared in a local newspaper the previous evening, and that another such article had appeared that morning (R. 59a, 63a–64a, 172a–175a). Counsel complained that the articles referred to petitioner as a former "numbers baron" and "numbers operator," and that one of them mentioned an earlier conviction of Katz (R. 64a). The government stated that it had no part in publishing the stories (R. 65a). The court did not interrogate the jurors separately as suggested by the defense (R. 64a–65a) but instead, asked the assembled jurors whether any of them had read either or both of the articles (R. 66a). Two jurors raised their hands (R. 66a). Upon questioning by the court, the two jurors individually answered that they understood they were not to be influenced by any account of the case not developed in the courtroom (R. 66a) and stated that they could render a verdict uninfluenced in any way by the newspaper articles (R. 66a–67a). The jurors as a group then indicated that they would not be influenced by the matter (R. 67a). The court instructed the jury that it must decide the case solely on the basis of the evidence adduced in the courtroom and advised the jurors to refrain from reading any accounts of the trial until the case was finally

determined (R. 67a). Petitioner's motion for a mistrial was denied (R, 68a). A later motion for a new trial was similarly denied with an opinion holding that the articles in question were not so inflammatory or prejudicial as to deprive the two jurors of their ability to follow the instructions (R. 181a–182a).

ARGUMENT

1. The trial court did not abuse its discretion in precluding a collateral inquiry designed to impeach the credibility of James by a comparison of his income and expenditures.[3] The limits to be set on cross-examination as to such matters are within the sound discretion of the trial court (*Glasser* v. *United States,* 315 U.S. 60, 83), and that discretion is not abused by precluding inquiry into a police officer's financial transactions. *Mays* v. *United States,* 261 F. 2d 662, 665 (C.A. 8). A tabulation of James' financial transactions here could have occasioned considerable delay in the course of the trial before any meaningful conclusion could have been drawn as to whether there was any unexplained source of income. Even then, the nature of that source would have remained a matter of speculation. Petitioner could have interrogated James directly concerning any unreported bribe payments, leaving the answers for the evaluation of

[3] Petitioner suggests that the inquiry could also have demonstrated a motive to testify falsely. Even if the inquiry could have shown unreported bribe payments by petitioner and others, however, there is no reason why these unreported payments would have motivated James to falsify the existence or nature of the reported payments involved in this case.

the jury, and considerable cross-examination of James was, in fact, allowed (R. 68a–159a). As the restriction on cross-examination was not improper, the restriction on the introduction of extrinsic evidence to show the possibility of misconduct was plainly not reversible error.

2. There is no merit to petitioner's contention that the government was obligated to prove, as part of its case in chief, that no wagering tax return had been filed by petitioner's partner, Katz. Although persons doing business in copartnership are required to pay but one special tax between them (26 U.S.C. 4902), the single return filed on behalf of the partnership must list the names and addresses of all members it is intended to cover (26 C.F.R. 44.4902–1). The government established that no return had been filed listing petitioner's name (R. 9a–11a). If a return had been filed by Katz individually, which was meant but not designated as a partnership return, this would certainly be, at most, a matter of defense for petitioner. See *United States* v. *Clancy*, 276 F. 2d 617, 635 (C.A. 7), reversed on other grounds, 365 U.S. 312. Here Katz, in fact, had filed no such return, and petitioner does not suggest otherwise.

3. The trial court did not abuse its discretion in determining that no mistrial was necessitated by the exposure of two jurors to newspaper accounts of the case. The court adequately instructed the jurors not to consider the matter, the jurors assured the court that they would not, and the two aspects of the articles

condemned by petitioner (his alleged occupation and Katz' prior conviction) were not so inflammatory as to destroy the jurors' ability to render a fair verdict. The reference to petitioner as a numbers operator was a pale reflection of the testimony disclosing petitioner's express admissions to James, and the information that "Katz was convicted last June on gambling charges and has appealed for a new trial" (R. 174a) must be viewed in light of the cross-examination of James by petitioner's counsel, who voluntarily asked about "the trial of Henry Katz in this court in June of this year" (R. 70a; see also R. 72a, 74a) and about a 1958 state case in which "Mr. Stupak and Mr. Katz were on trial" (R. 80a; see also R. 84a, 88a, 115a, 140a).[4] Newspaper divulgence of a co-defendant's admitted guilt will not necessarily require a new trial (*United States* v. *Crosby*, 294 F. 2d 928, 950 (C.A. 2), certiorari denied *sub nom. Mittelman* v. *United States* 368 U.S. 984), and the present circumstances present a much smaller chance of prejudice. The trial judge has a "large discretion in ruling on the issue of prejudice," *Marshall* v. *United States*, 360 U.S. 310, 312. That discretion was not abused.

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[4] James was cross-examined extensively about his testimony in the two earlier cases (R. 60a–75a, 80a–96a, 115a–116a, 140a–144a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1965.

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UNITED STATES OF AMERICA,

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CHESTER WILLIAM STUPAK.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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NO. 278

UNITED STATES OF AMERICA,

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CHESTER WILLIAM STUPAK.

PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Chester William Stupak, prays that the Court grant a rehearing on the Petition for Certiorari which was denied on October 11, 1965. In support of his prayer, petitioner submits that substantial grounds not previously presented are available in support of rehearing and that this petition is confined to such additional grounds as appears more fully hereinafter.

ADDITIONAL QUESTIONS PRESENTED

1. Was there competent proof that petitioner was engaged in the business of accepting wagers?

2. Did the trial court permit the reception of incompetent "expert" testimony?

3. Did the trial court err in refusing petitioner the right to correct an untruthful statement of the prosecuting witness inferring that petitioner had been convicted in a state court trial?

REASONS FOR GRANTING REHEARING

1. There was no competent proof that defendant was engaged in a business of accepting wagers.

As pointed out in *Rahke v. United States,* 180 F. Supp. 576, 149 Ct. Cl. 33, the test of whether one is engaged in wagering is whether he is risking his money in a game of chance in which he may win or lose depending on the eventuality. Although the evidence recited above may have been sufficient to show that defendant was associated as a principal with Katz in an activity described as a numbers business, there was no competent proof that such was a business of accepting wagers as above defined and as required by the Act. That the operation of a numbers business is a game of chance with a wagering aspect is not such a matter of common knowledge as to eliminate the need for proof. The correctness of the foregoing proposition is demonstrated in this case by the calling on behalf of the government of an expert witness whose role was to explain to the jury the methods and workings of numbers lotteries (16a). His testimony (discussed below) was not competent but if competent was not given in relation to defendant and in any event the government offered no proof that defendant's alleged business had the characteristics described by the expert. Proof that wagering was involved was supplied neither by the admission of the defendant—which went to his being in a "numbers" business—nor by corroborating evidence of the confiscation of cash and numbers slips coinciding with the arrests of persons Katz or Stupak had identified to James as being their writers. No transmittals of funds to the alleged principals, no headquarters operations and no

pay-offs were shown. What was done with slips or cash does not appear. The nature of the business was not proved.

Therefore, the determination that defendant was in the business of accepting wagers is sustainable on this record only if it can be properly said — first, that all so-called numbers business have the characteristics as described by the government's expert, or second, that by designating an activity as a numbers business the government is entitled to a presumption that wagers are being accepted without having to prove that to be so. To allow the result in either ground would, we believe, negate the idea that every element of the crime charged against defendant was required to be proved beyond reasonable doubt.

2. The Court erred in receiving the testimony of Edward Zelik.

This man was a ten-year employee in the Intelligence Division of the Internal Revenue Service and had participated in investigations relating to numbers lotteries. He was called as an expert "regarding the methods of number lotteries and how they work so that the jury can understand how they work, and the different organizational structures of a numbers lottery" (16a). Objection to this offer was overruled (16a). On direct, the witness gave a lengthy exposition covering, *inter alia*, what is meant by playing a number, the difference between the "stock" and the "race" number, how to play a number—straight or in combination, the odds, what is a writer and how he is paid, what is a pick-up man and how he is paid, what is a banker, about "spread-

ing the risk" and other similar matters. The numbers lotteries described by him involved accepting wagers.

While the foregoing testimony tended to create a picture of large-scale numbers operations existing in many variations in the Pittsburgh area in 1957, it was not offered as describing the operation the government claimed the defendant had. However, the characteristics of illicit numbers operations, in general, was not germane or proper in proof of the specific charges made against the defendant, and could only serve to precondition or prejudice the minds of the jurors against the defendant. The record is barren of any proof by which this harmful testimony can be shown to have relevance to the present prosecution. Its real function was to camouflage and cover the complete absence of proof that the activities of the defendant as shown by the government constituted a business of accepting wagers. The fact that others were in such a business was not relevant. Zelig's testimony should have been excluded as being irrelevant and incompetent.

The present prosecution was wholly unlike the situation outlined in *United States v. Whiting,* 4 Cir., 311 F. 2d 191, certiorari denied 372 U. S. 935, rehearing denied 372 U. S. 972. In that case experts were permitted to express an opinion that the activities of the *defendants,* which they witnessed, and which were outlined in the evidence, constituted the operation of a lottery. 311 F.2d at 197.

No similar or proper purpose was served by the use of expert testimony in this case. Even if not so intended by the government, introduction of such testimony made it difficult or impossible for the jury to determine

whether on the relevant facts in evidence the defendant was shown to be involved in a type of business included under the statute.

Similar expert testimony was held to be improper in *United States v. Sette,* 2 Cir. 334 F. 2d 267, 269. There was in that case proof of a business of receiving wagers from bettors but no direct evidence that defendant had a proprietary interest in the gambling operation. The trial Court permitted two revenue agents to give expert testimony, on the basis of their observations and general knowledge, that Sette had a proprietary interest in the operation. In reversing the judgment, the Court of Appeals pointed out that those in charge of the investigation had not chosen to seek direct proof of the nature of defendant's involvement and having failed to do so:

> "* * * could not remedy this obvious defect in proof by assuming the role of experts and stating their opinions on what they had to prove. We are cited to no case, and have found none, that remotely justifies this highly unusual method of establishing a *prima facie* case in a criminal prosecution of this type."

3. The Court erred in refusing defendant's attorney the opportunity to correct an untruthful or malicious statement by James on cross examination inferring that the defendant had been convicted in a State Court trial.

In 1958, the defendant and Katz had been tried in a State Court trial of charges *inter alia,* of bribery, operating a lottery and conspiracy, on the basis of the same transactions involved in this case. They were acquitted. Even before the trial began the United States attorney sought to obtain a ruling that before the prior proceedings be brought up there should be a side bar conference (T. 3-T. 7). When it became necessary to refer to the result of the State Court trial, defendant's counsel requested permission to do so. The following occurred during cross examination (152a-153a):

"Q. All right Sir, And, you went on in the matter that you have discussed here, and you are the only person in the world who knows for certain the exact sums of money that you received?

A. Well, along with the co-conspirators in the case. I guess they know as well as I do.

Q. Who are your co-conspirators?

Mr. Reich: Objection.

The Court: Rephrase the question, Mr. Moses.

By Mr. Moses:

Q. Who are you referring to as co-conspirators? Somebody who is doing something with you?

A. No. The ones that was guilty of the conspiracy, the conspiracy of bribe.

Q. In your judgment, they were guilty of conspiracy?

A. Do you want me to answer that?

Mr. Moses: Now, your Honor, I would ask leave of the Court to refer to the trial in the State Court.

The Court: Now, this is on the basis of your own cross examination.

Mr. Reich: That is the basis of my objection, your Honor. He can't set it up like that.

The Court: Objection sustained."

It is obvious that the witness himself created an impression that the defendant had been convicted of a conspiracy. Counsel for the defendant was not responsible for the kind of answer the witness decided to make to the question. After James had insinuated that the defendant had been convicted which was untrue, it was certainly necessary and proper to correctly show the facts. It was an error for the Court to withhold permission. It was contrary to a sense of fair play that the United States Government would, as it did, prevent the correction of an unfair state of the record.

CONCLUSION

On the basis of the foregoing, your petitioner prays for rehearing on the petition for certiorari.

Respectfully submitted,

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PAUL E. MOSES
Attorneys for Petitioner

CERTIFICATE

I certify that the foregoing petition for rehearing is presented in good faith and not for delay and is confined to grounds believed to be substantial and not previously presented.

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PAUL E. MOSES